

# Review of National Implementing Legislation

The Departments of Commerce, State, and Justice and the United States Securities and Exchange Commission have conducted a review of implementing legislation of the eleven foreign countries for which the Convention was in force as of July 1, 1999. These countries are Bulgaria, Canada, Finland, Germany, Greece, Hungary, Japan, Korea, Iceland, Norway, and the United Kingdom. We have also included a brief summary of the amendments to the Foreign Corrupt Practices Act (FCPA). In next year's report, we will review the implementing legislation of additional countries that have enacted national implementing legislation and ratified the Convention.

We are generally encouraged by the seriousness with which signatories have approached their commitments under the Convention. In addition to the eleven signatories noted above, four others—Austria, Belgium, Mexico, and Sweden—have enacted implementing legislation. In all the remaining countries, governments have either introduced implementing legislation or are expected to do so soon. By the time of next year's report, most signatories should have enacted implementing legislation, ratified the Convention and deposited instruments of ratification with the OECD.

Our methodology for analyzing implementing legislation was to compare new or existing legislation

with the requirements of the Convention. We looked first at whether the law contains provisions implementing the basic statement of the offense, set forth in Article 1 of the Convention, which obligates the country to criminalize the bribery of foreign public officials. We also looked closely at the definitions of the offender and offeree of the bribe, to ensure that transactions within the scope of the Convention are adequately covered, pursuant to Article 1 of the Convention. Article 1 requires each Party to criminalize the bribery of foreign public officials by "any person." It defines "foreign public official" as any person holding a legislative, administrative or judicial office, whether they are appointed or elected, any person holding a public function, and any official or agent of a public international organization. We then examined the manner and extent to which the country will exercise its jurisdiction in enforcing its law, in accordance with Article 4 of the Convention.

We have paid special attention to the penalties imposed for the criminal offense of bribery of foreign public officials, which Article 3 of the Convention states must be "effective, proportionate, and dissuasive." Where possible, we have examined other issues, such as bribery as a predicate offense to money laundering (Convention Article 7), provisions on

books and records (Convention Article 8), mutual legal assistance and extradition (Convention Articles 9 and 10), and conspiracy, attempt and authorization (Convention Article 1.2).

Drawing from this methodology, each country review follows the same format:

- Basic statement of the offense.
- Jurisdictional principles.
- Coverage of payor/offender.
- Coverage of payee/offeree.
- Penalties.
- Books and records provisions.
- Money laundering.
- Extradition/mutual legal assistance.
- Complicity (including incitement, aiding and abetting, or authorization), attempt, conspiracy.

We used a variety of sources in our analyses, including texts of laws, diplomatic reporting and exchanges, private sector comments, publications, and other materials. Analyzing a signatory's implementation of the Convention, however, is a complex undertaking. It requires an in-depth understanding of not only the new laws that bring the Convention into effect but the entire body of legislation relevant to bribery and corruption. How these laws are interpreted and enforced differs markedly among the signatories.

A particular analytical difficulty is that several countries did not enact comprehensive, self-contained legislation criminalizing bribery. Rather, they passed amendments to existing antibribery legislative provisions or selected provisions necessary to implement the basic offense of bribery (Article 1 of the Convention). For other countries, a complete understanding of the adequacy of implementation requires an in-depth analysis of relevant laws and regulations on accounting, books and records, money laundering and complicity. As several countries had not yet deposited their official translations of their legislation in the OECD working languages (i.e., English or French), we took the initiative to obtain informal translations so that U.S. agencies could begin their review. Despite these limitations, we were able to complete an initial analysis of all eleven foreign signatories' implementing legislation.

We are continuing to review information on relevant legislation and to monitor the signatories' implementation of the Convention, independently and within the OECD Working Group on Bribery. Much more analysis of implementing legislation and related laws is required before a definitive assessment can be made of their compatibility with the Convention. To the ex-

tent that resources permit, we will seek to expand our contacts with key countries in the coming year to obtain more detailed information on relevant laws and gain a better understanding of them through discussions with country experts.

This preliminary analysis, though limited in scope, developed an initial understanding of signatories' efforts to date and highlighted issues for more in-depth study. Generally the eleven countries examined have all sought to address the requirements of the Convention in explaining their implementing legislation. Based on the text of legislation, many of the requirements appear to have been met. Questions, however, emerged from our analyses that require further examination.

- In Bulgaria, it is not clear whether the law provides for noncriminal sanctions against legal persons or confiscation of proceeds of bribery, as required by the Convention.

- Japan's implementing legislation raises several issues. Maximum fines for natural and legal persons are limited to approximately \$25,000 and \$2.5 million, raising concerns about whether they meet the Convention's requirement to be "effective, proportionate and dissuasive." There is also a concern that Japan will not subject the proceeds of bribery to confiscation or will not impose monetary sanctions of comparable effect in lieu of such confiscation, as required by the Convention.

- In Germany's implementing legislation, there are questions about the extent to which fines will be "effective, proportionate and dissuasive." It is not clear whether Germany will implement its law by imposing fines on corporations in amounts limited to approximately \$531,300 (dollar equivalent of the statutory fine for corporations embodied in its Administrative Offenses Act) or whether Germany will seek to impose fines up to the amount of the commercial advantage gained from the bribery.

- Norway's implementing legislation raises two concerns. The maximum penalty for bribery of a public official is imprisonment for only up to one year, and the relevant statute of limitations is only two years.

- For the United Kingdom, existing legislation on corrupt practices does not explicitly address bribery of foreign public officials and questions remain about whether it is adequate for implementing the Convention.

- Also, none of the eleven countries' implementing legislation explicitly addresses bribery of foreign political parties, party officials, and candidates. However, such provisions, while desirable from the U.S. perspective, are not specifically mandated by the Convention. (This subject is discussed in greater detail in Chapter 6, Subsequent Efforts to Strengthen the Convention.)

As we continue our analysis of implementing legislation and more information becomes available, we will be in a better position to assess the overall conformity of signatories' laws with the Convention. In the meantime, preliminary analysis of the eleven signatories' legislation has helped to identify strengths and potential weaknesses in implementation and establish a useful framework for more in-depth legal analysis. The analysis will be useful for our participation in the Working Group and our dialogue with signatories on promoting effective implementation of the Convention.

## Summary of Amendments to the FCPA

Through the FCPA, the United States declared its policy that American companies should act ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest, transparent business practices. The FCPA requires both issuers and all other U.S. nationals and companies (defined as "domestic concerns") to refrain from making any unlawful payments to public officials, political parties, party officials, or candidates for public office, directly or through others, for the purpose of causing that person to make a decision or take an action, or refrain from taking an action, or to use his influence, for the purpose of obtaining or retaining business.

The International Anti-Bribery and Fair Competition Act of 1998 (IAFCA) amended the FCPA to conform it to the requirements of and to implement the OECD Convention. First, the FCPA formerly criminalized payments made to influence any decision of a foreign public official or to induce him to do or omit to do any act in order to obtain or to retain business. The IAFCA amended the FCPA to include payments made to secure "any improper advantage," the language used in Article 1(1) of the OECD Convention.

Second, the OECD Convention calls on parties to cover "any person"; the FCPA prior to the passage of

the IAFCA covered only issuers with securities registered under the 1934 Securities Exchange Act and "domestic concerns." The IAFCA expanded the FCPA's coverage to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States.

Third, the OECD Convention includes officials of public international organizations within the definition of "public official." Accordingly, the IAFCA similarly expanded the FCPA's definition of public officials to include officials of such organizations. Public international organizations are defined by reference to those organizations designated by Executive Order pursuant to the International Organizations Immunities Act (22 U.S.C. § 288), or otherwise so designated by the President by Executive order for the purpose of the FCPA.

Fourth, the OECD Convention calls on parties to assert nationality jurisdiction when consistent with national legal and constitutional principles. Accordingly, the IAFCA amended the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States.

Fifth and finally, the IAFCA amended the FCPA to eliminate the current disparity in penalties applicable to U.S. nationals and foreign nationals employed by or acting as agents of U.S. companies. Prior to passage of the IAFCA, foreign nationals employed by or acting as agents of U.S. companies were subject only to civil penalties. The IAFCA eliminated this restriction and subjected all employees or agents of U.S. businesses to both civil and criminal penalties.

## Bulgaria

Bulgaria signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD Secretariat on December 22, 1998. A Law on Amendment to the Penal Code was passed by Parliament on January 15, 1999, and came into force on January 29, 1999.

Bulgaria has enacted implementing legislation through amendments to Articles 93 and 304 of the Bulgarian Penal Code to cover bribery of foreign public officials in the course of international business activities. The following analysis is based upon the amended provisions of the Bulgarian Penal Code.

We understand that the Bulgarian legal system does not provide for the criminal liability of legal per-

sons. In such cases, the Convention requires that a legal person be subject to commensurate noncriminal sanctions, including monetary penalties. It is not clear whether Bulgarian law provides for such noncriminal sanctions. In addition, it is not clear whether the confiscation provision in the Bulgarian Penal Code applies to the confiscation of the proceeds of bribery in addition to the bribe itself.

### **Basic Statement of the Offense**

Under Article 304 of the Penal Code, it is unlawful to give a gift or any other material benefit to an official in order that the official perform or not perform an act within the framework of his or her service. As amended, this applies to persons who bribe a foreign public official while the person is carrying out international business activities.

Article 304 does not address the element of intent, bribes made through intermediaries, or bribes paid on behalf of an official to a third party. (Article 305(a) imposes criminal liability on persons who “mediate” in the giving or receiving of a bribe.)

### **Jurisdictional Principles**

We understand that the Penal Code applies to all crimes committed in Bulgarian territory. It is not clear what acts in furtherance of the bribe would be required to trigger the exercise of such territorial jurisdiction. Under Article 4 of the Penal Code, Bulgaria also exercises jurisdiction over crimes committed abroad by Bulgarian nationals. It is also our understanding that this applies to the bribery of foreign public officials.

Under Article 80 of the Penal Code, the statute of limitations for offenses carrying a penalty of imprisonment for three years or less is two years.

### **Coverage of Payor/Offeror**

Article 304 applies to any person, without reference to nationality.

### **Coverage of Payee/Offeree**

Article 93(15) of the Penal Code, as amended, defines “foreign official” as any person

- Performing duties in a foreign country’s office or agency.
- Performing functions assigned by a foreign country, including state-owned enterprises or organizations.
- Performing duties, assignments, or tasks delegated by an international organization.

### **Penalties**

Under Article 304 of the Penal Code, the penalty for bribery of domestic or foreign public officials is imprisonment for a term of up to three years, unless the official has violated his official duties in connection with the bribe, in which case the penalty is imprisonment for a term of up to five years.

We understand that legal persons cannot be held criminally liable under the Bulgarian legal system. It is not clear whether legal persons who bribe foreign public officials would be subject to effective, proportionate and dissuasive noncriminal sanctions, as is required by Article 3(2) of the Convention.

Under Article 307(a), the “object of the crime” is subject to confiscation and, if it is missing, a monetary sanction of equal value shall be assessed. It is not clear whether, in the context of bribery, the object of the crime refers only to the bribe itself, or whether it would also cover the proceeds of bribery, as provided in Article 3(3) of the Convention.

### **Books and Records Provisions**

Article 308 of the Penal Code provides that persons who forge an official document are subject to punishment by imprisonment for a term of up to three years (except in minor cases). Under Article 309, persons who forge a private document are subject to punishment by imprisonment for a term of up to two years. (It is not clear whether company records would be considered official or private documents for purposes of these provisions.) It is uncertain whether and to what extent other provisions in the Penal Code would apply to accounting offenses.

### **Money Laundering**

It is our understanding that bribery of a domestic or foreign public official is a predicate offense for purposes of the application of Bulgarian money laundering legislation. Under Article 253 of the Penal Code, persons who conclude transactions with funds or property known or believed to have been acquired through criminal activity are subject to imprisonment for a period of up to three years and a fine of from 3 million to 5 million levs (approximately \$1,600 to \$2,700).

### **Extradition/Mutual Legal Assistance**

Bribery is not listed as an extraditable offense under the 1924 U.S.-Bulgaria extradition treaty. However, Article 10(1) of the Convention provides that bribery of a foreign public official shall be deemed to

be an extraditable offense under extradition treaties between the parties. Dual criminality is required under the treaty and under Article 439(a)(2) of the Penal Code. The Bulgarian Constitution (Article 25(4)) and the Penal Code (Article 4(2)) prohibit the extradition of Bulgarian nationals. The United States and Bulgaria do not have a mutual legal assistance treaty. It is our understanding that Bulgaria has authority to provide mutual legal assistance, on the basis of reciprocity.

### **Complicity, Attempt, Conspiracy**

Under Article 21 of the Penal Code, complicity is punishable by the penalty provided for the substantive crime, with due consideration for the nature and degree of the participation. Attempt is covered under Article 17-19. Article 18 provides that the penalty for attempt is that of the substantive crime, with due consideration for the degree of implementation and the reasons why the crime was not completed.

## **Canada**

The Canadian Corruption of Foreign Public Officials Act, 46-47 Elizabeth II ch. 34, was adopted on December 7, 1998, assented to on December 10, 1998 and entered into force on February 14, 1999.

Sources for this analysis include the text of the act, diplomatic reporting, and information from non-governmental organizations.

### **Basic Statement of the Offense**

Section 3(1) of the Corruption of Foreign Public Officials Act provides:

Every person commits an offense who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official;

(a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

The Act contains exceptions for facilitation payments, payments that are lawful under the written law

of the receiving official's country, and payments related to *bona fide* business promotion and execution of a contract. See Sections 3(3) & (4).

### **Jurisdictional Principles**

The Corruption of Foreign Public Officials Act does not contain any specific provisions governing jurisdiction. It is also our understanding that Canadian courts will assert territorial jurisdiction where a significant portion of the activities constituting the nature of the offense takes place in Canada. There must be a real and substantial link between the offense and Canadian territory.

It is our understanding that the courts in Canada have adopted a two-part test for determining whether a crime took place in Canada. The court will first consider all the relevant acts that took place in Canada that may have legitimately given Canada an interest in prosecuting the offense. Second, the court will consider whether it would offend international comity to assert jurisdiction over those acts and the offense. See *Libman v. R.*, 2 S.C.R. 178 (1985).

Canada has not asserted extraterritorial jurisdiction over this offense. However, Canadian law provides that any person who, while outside Canada, conspires to commit an indictable offense in Canada shall be deemed to have committed the offense of conspiracy in Canada. See Criminal Code § 465(4). The penalties for conspiracy are the same as those for the substantive offense. See Criminal Code § 465(1)(c).

### **Coverage of Payor/Offendor**

The Corruption of Foreign Public Officials Act applies to "every person," without reference to nationality. "Person" includes "Her Majesty and public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively." See Criminal Code § 2.

### **Coverage of Payee/Offeree**

Section 2 of the Corruption of Foreign Public Officials Act defines a "foreign public official" as

(a) a person who holds a legislative, administrative, or judicial position of a foreign state;

(b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is es-

tablished to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and

(c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

The act further defines a foreign state to include national government of a foreign government and its political subdivisions, and their departments, branches, and agencies.

The definition of a public official includes persons employed by “a board, commission, corporation or other body of authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function.” It is our understanding that the legislature intended that judges interpret the terms of the act by reference to the OECD Convention and Official Commentaries, which provide that a “public enterprise” is “any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.” The Act does not address whether state-owned enterprises acting in a commercial context are covered. The Official Commentaries affirmatively state that they are not so covered if the enterprise receives no subsidies or privileges. *See* OECD Commentary footnote 14.

## Penalties

The Corruption of Foreign Public Officials Act provides for a sentence of imprisonment of not more than five years. We understand that corporations are subject to fines at the discretion of the court with no maximum set by statute. There does not appear to be any guidance as to the proper calculation of the fine.

The penalties under the act are roughly congruent to the penalties for domestic bribery except that a person convicted of bribery of a foreign public official is not subject to debarment. Bribery of domestic public and municipal officials is punishable by imprisonment for up to five years and corporations are subject to a fine. *See* Criminal Code §§ 121, 123. Bribery of law enforcement officials and judges is subject to a sentence of fourteen years imprisonment. *See* Criminal Code §§ 119, 120.

In addition, a person convicted of bribery of a public official (but not a municipal official) is automatically debarred from government contracting or employment unless pardoned or specifically reinstated

by the Governor in Council. *See* Criminal Code § 750(3). Bribery of a municipal official will not result in debarment because there is no direct link between the infraction and the Crown.

In addition to the penalties for bribery, the act contains two other offenses: possession of the proceeds of bribery (Section 4) and laundering of the proceeds of bribery (Section 5). The penalty for violation of these provisions is up to ten years imprisonment, a penalty that is higher than that for the bribery offense itself.

The act incorporates Section 2 of the Criminal Code which defines “person” to include “bodies corporate.” We understand that corporations may be prosecuted criminally in Canada.

The Canadian theory of liability appears to be similar to, but potentially somewhat narrower than, that of the United States. It focuses on an identification of the corporation with the “directing mind,” which is anyone who has been authorized to exercise “the governing executive authority of the corporation.” A corporation can be liable if the criminal acts are performed by the manager within the sector of operation assigned to him or her by the corporation. The sector may be functional or geographic or may embrace the entire undertaking of the corporation.

Sections 7 and 9 of the Corruption of Foreign Public Officials Act adds the three offenses created under the act (bribery, possession of proceeds, and money laundering of proceeds) to the statutory list of “enterprise crimes,” *see* Criminal Code § 462.3, thus enabling the government to obtain warrants to search, seize, and detain the proceeds of these offenses and to obtain an order of forfeiture upon conviction. *See* Criminal Code §§ 462.32-.5.

## Books and Records Provisions

Canada has a number of statutes that govern books and records. They prohibit falsification of books and documents, false pretense, false statement, false prospectus, forgery, and fraud. *See* Criminal Code §§ 361-62, 366, 380, 397, and 400. However, Canadian business leaders have criticized the Canadian laws as insufficient because they do not prohibit off-the-books accounts, inadequately identified transactions, the recording of nonexistent expenses, and the use of false documents.

The Generally Accepted Auditing Standards in effect in Canada require the auditor to obtain a written certification from management that it is not aware of any illegal or possibly illegal acts.

## Money Laundering

Sections 5 and 7 of the Corruption of Foreign Public Officials Act criminalize the laundering of the proceeds of any payment in violation of the act and makes offenses under the act predicate offenses under Canada's money laundering legislation. *See* Criminal Code 462.3. The Act further criminalizes the laundering of the proceeds of any payment that "if it had occurred in Canada, would have constituted an offense under section 3."

## Extradition/Mutual Legal Assistance

Canada will provide mutual legal assistance and extradition with respect to the offenses covered by the OECD Convention. Under Canadian law, there must be an extradition agreement with the country requesting extradition; that country must punish the offense by imprisonment for a maximum term of two or more years; and the equivalent offense must also be punishable under Canadian law by a maximum term of imprisonment of two or more years.

## Complicity, Attempt, Conspiracy

Canadian law permits prosecution for attempt and aiding and abetting. *See* Criminal Code §§ 21(1), 24.

The Corruption of Foreign Public Officials Act covers any individual who "agrees to give or offer" a payment. *See* § 3(1). In addition, as noted, Canadian law provides that a conviction for conspiracy carries the same penalties as a conviction for the substantive offense.

## Finland

Finland signed the Convention on December 17, 1997, and enacted implementing legislation on October 9, 1998. Finland was the sixth country to deposit its instrument of ratification with the OECD on December 10, 1998. The implementing legislation entered into force on January 1, 1999.

Sources for this analysis include a translation of the new provisions to the Finnish Penal Code, Chapter 16, entitled "Offenses against Public Authorities," as well as information from our embassy in Helsinki.

## Basic Statement of the Offense

The basic statement of the offense of bribing foreign public officials is set forth in Chapter 16 of the Finnish Penal Code, Section 13 on bribery:

- (1) A person who to a public official, to an employee of public corporation, to a soldier, to a

person in the service of the European Communities, to an official of another Member State of the European Union or to a foreign official of another Member State of the European Union or to a foreign official, in exchange for his/her actions in service, promises, offers or gives a gift or other benefit, intended to the said person or to another, that affects or is intended to affect or is conducive to affecting the actions in services of the said person, shall be sentenced for bribery to a fine or to imprisonment for at most two years.

- (2) A person who, in exchange for the actions in service of a public official or another person mentioned in paragraph (1) promises, offers or gives a gift or other benefit mentioned in the said paragraph to another person, shall also be sentenced for bribery.

Generally, Section 13 provides that persons who intentionally promise, offer, or give gifts or other benefits either directly or indirectly to a foreign public official to affect the behavior of such an official may be imprisoned for a maximum period of two years or fined. The provision is not limited to bribes in the context of international business. Although intermediaries are not specifically mentioned, the provision says that bribes "intended" for public officials are covered. Payments involving third parties are covered under Section 13(2).

## Jurisdictional Principles

Finland practices both territoriality and nationality jurisdiction. Chapter 1, Section 1 of the Finnish Penal Code provides that Finnish law shall apply to offenses committed in Finland. Pursuant to Section 10 of the same chapter, acts are deemed to have been committed in Finland if the criminal act occurred in Finland or if the consequences of the offense as defined by statute were realized in Finland. Chapter 1, Section 6 of the Finnish Penal Code allows for the prosecution of a Finnish citizen who commits an offense outside of Finland. Chapter 1, Section 11 of the Finnish Penal Code requires dual criminality for offenses committed abroad by a Finn. The Finnish provisions on jurisdiction have been part of Finnish Penal law since 1996 and no changes were needed to implement the Convention.

## Coverage of Payor/Offeror

The Finnish legislation covers bribery by any person. It is our understanding that "any person" is to be

broadly construed, applying to both natural and legal persons to the extent of Finland's jurisdiction.

The Finnish provisions on corporate criminal liability found in Chapter 16, Section 28 of the Finnish Penal Code also apply to bribery of foreign public officials. Under Chapter 9, Section 2 of the Penal Code, a Finnish corporation may be fined for the actions of its management representatives or employees, when acting within the scope of their employment on behalf or for the corporation or for its benefit, if they act as accomplices in committing an offense or allowed the offense to happen. Section 2(2) states that even if a specific person cannot be identified as the offender, the corporation itself can still be fined.

Penal Code Chapter 9, Sections 4 and 6 set forth illustrative lists of factors that must be taken into account when determining sentencing for individuals and imposing fines on corporations, including: the lack of corporate oversight; the position of the offender in the corporation; the seriousness of the offense; the consequences to the corporation due to the commission of the offense; measures, if any, taken by the corporation to prevent the offense from occurring; whether the offender sentenced is part of management; the size of the corporation; the amount of shares held by the offender; and the extent to which the offender can be held personally liable for the commitments of the corporation. For fines, the list also takes into account not only the size of the corporation, but also its solvency, earnings, and other indicators of its financial circumstances. Section 9 provides that the statute of limitations for the imposition of any corporate fine is five years.

### **Coverage of Payee/Offeree**

In Chapter 16, Section 20, of the Finnish Penal Code, a "foreign public official" is defined as a person who in a foreign State has been appointed or elected to a legislative, administrative or judicial office or duty, or who otherwise performs a public duty for a foreign State, or who is an official or representative/agent of an international organization under public law.

Although the Finnish definition of foreign public official contains no reference to employees of a "public agency or public enterprise" as does Article 1(4)(a), Section 13 of the Finnish law, the provision containing the basic statement of the offense, does prohibit bribes to employees of public corporations.

### **Penalties**

Under Chapter 16, Section 13, the Finnish law provides for a fine or a two-year maximum prison sentence for persons who have committed bribery of domestic public officials. No amount for the fine is specified. In addition, for "Aggravated Bribery," the offender shall be sentenced to a minimum of four months and a maximum of four years imprisonment. These provisions also apply to the bribery of foreign public officials, so the penalties for domestic and foreign bribery are the same. Corporations can also be fined pursuant to Chapter 9 of the Finnish Penal Code as set forth above. There does not appear to be a maximum or minimum fine for either persons or corporations under the Finland's implementing legislation.

Chapter 40, Section 4 of the Finnish Penal Code covers forfeiture of bribes: the gift or benefit or the corresponding value will be forfeited to the State from the bribe recipient or beneficiary. Section 4 applies to passive bribery. We understand that although the Finnish penal code does not specifically address forfeiture for active corruption, Chapter 2, Section 16 of the Penal Code provides for forfeiture generally, and can be applied to offenses of active corruption. We understand that there are no additional civil or administrative sanctions for bribery under Finnish law.

Statutes of limitations are covered under the Finnish Penal Code Chapter 8, Section 1, which provides that charges must have been brought within five years after the offense for the imposition of a sentence. For Aggravated Bribery, the statute of limitations is ten years.

### **Books and Records Provisions**

The Finnish law on accounting provisions is covered under Chapter 30, Section 9 of the Finnish Penal Code:

If a person with a legal obligation to keep accounts, his/her representative or the person entrusted with the keeping of accounts intentionally (1) neglects in full or in part the recording of business transactions or the balancing of the accounts, (2) enters false or misleading data into the accounts, or (3) destroys, conceals or damages account documentation and in this way essentially impedes the obtaining of a true and sufficient picture of the financial result of the business of the said person or of his/her financial standing, he/she shall be sentenced for an accounting offense to a fine or to imprisonment for at most three years.



The Accounting Act applies to all Finnish enterprises.

### **Money Laundering**

Money laundering is a crime under Chapter 32, Section 1(2) of the Finnish Penal Code. It covers all assets or property resulting from offenses of the Finnish Penal Code, including bribery of foreign public officials.

### **Extradition/Mutual Legal Assistance**

The Finnish Extradition Act provides that Finnish nationals shall not be extradited. Section 4 of the Extradition Act provides that extradition will not be granted unless the request is based upon an act that is an extraditable offense, or the act, if it had been committed in Finland, constitutes an offense for which the penalty is greater than one year. Acts within the scope of Article 1 of the Convention will fulfill the dual criminality requirement, as the Finnish penalty for bribery is a maximum of two years. It is unclear whether Section 4 applies to nationals as well as non-nationals. Under the Extradition Act between Finland and other Nordic countries, Finnish nationals may be extradited to other Nordic countries in some cases. Finland is expected to ratify soon the 1996 Convention relating to extradition between member states of the European Union. After ratification of that convention, Finland will be able under certain conditions, to extradite Finnish nationals to other European Union states.

Our embassy reports that mutual legal assistance is provided for by the Finnish Act on International Legal Assistance in Criminal Matters. Under that act, Finland can provide assistance without the condition of dual criminality, except where coercive measures are requested, unless such measures would be available under Finnish law had the offense upon which the request is based occurred in Finland.

### **Complicity, Attempt, Conspiracy**

Chapter 5 of the Finnish Penal Code contains provisions on conspiracy, attempt, and authorization. Under Chapter 5, Section 1, if two or more persons have committed a crime together, they shall be punished as principals. If the offense is carried out or attempted, under Chapter 5, Section 2 of the Penal Code, a person who encouraged another in committing the offense will be punished for incitement as a principal. Complicity is covered by Chapter 5, Section 3, which provides that a person who acts to fur-

ther the crime, whether it is carried out or attempted, will be sentenced under the same provisions as a principal. Finnish law does not specifically criminalize an attempt to bribe a foreign public official, as the basic prohibition already covers promising and offering bribes to such officials.

## **Germany**

Germany signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on November 10, 1998. The German legislation entered into force on the same date as the Convention, February 15, 1999.

Sources for this analysis include Germany's implementing legislation, entitled the Act on the Convention dated December 17, 1997, on Combating Bribery of Foreign Public Officials in International Transactions, dated September 10, 1998 (ACIB), and reporting from our embassy in Berlin.

### **Basic Statement of the Offense**

Germany's basic statement of the offense is in two parts. With respect to officials, soldiers, and judges, the ACIB prohibits

bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an unfair advantage in international business transactions.

ACIB § 2(1). Germany implemented the Convention by making judges, officials, and soldiers of foreign governments and international organizations "equal" to domestic judges, officials, and soldiers for purposes of Sections 334 (active bribery), 335 (severe cases of bribery), 336 (omission of public service), and 338 (fine and forfeiture). The basic offense, therefore is defined in Criminal Code Section 34 as follows:

Whoever offers, promises, or grants an advantage to any official, any person specifically engaged for public service, or any soldier of the Federal Armed Forces, on behalf of such person or for a third party, in return for the performance of a past or future public service and the past or future breach of his official duties, shall be punished.

Unlike the domestic bribery provisions, the implementing legislation applies to "future judicial or official acts." As Section 334 applies to "offers," the timing of the payment itself, whether before or after the

corrupt act, is not determinative. In addition, the implementing legislation refers to “official act;” the domestic bribery laws use the term “performance of past or future public service and the past or future breach of his official duties.”

The second prong of the implementing legislation applies to bribery of foreign parliamentarians. The implementing legislation provides in ACIB § 2(2) that

Anyone who offers, promises, or grants to a member of a legislative body of a foreign state or to a member of a parliamentary assembly of an international organization an advantage for that member or for a third party in order to obtain or retain for him/herself or a third party business or an unfair advantage in international business transactions in return for the member’s committing an act or omission in future in connection with his/her mandate or functions, shall be punished.

### **Jurisdictional Principles**

Germany applies the principles of both territoriality and nationality jurisdiction. Germany will assert jurisdiction when an offender or participant has acted or ought to have acted within its territory or when the “success of the offense” occurs within its territory. *See* Criminal Code §§ 3, 9. In addition, Germany will assert jurisdiction over the acts of its nationals abroad.

### **Coverage of Payor/Offeror**

German law applies to “whoever” offers or pays a bribe, although Germany does not presently provide criminal responsibility for corporations. However, pursuant to Section 30 of the Administrative Offenses Act, a legal person may be fined when a person acting for the corporation was authorized by or was himself or herself “in a leading position.” It is our understanding that the corporation may be held liable when a person in a leading position fails to properly supervise his subordinates. *See* Administrative Offenses Act, § 130.

German law provides that a corporation cannot be held administratively liable if the criminal offense itself cannot be prosecuted for “legal reasons.” It is our understanding that this refers to such legal impediments as the statute of limitations and not mere inability to assert jurisdiction over a culpable individual.

### **Coverage of Payee/Offeree**

The implementing legislation covers payments offered or made to (1) judges of a foreign state or an

international court; (2) public officials of a foreign state or “persons entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a public state; (3) a public official or other member of the staff of an international organization or a person entrusted with carrying out its functions; (4) a soldier of a foreign state or one who is entrusted to exercise functions of an international organization; and (5) a member of a legislative body or parliamentary assembly of a foreign state or international organization. *See* ACIB § 2(1)(1). In addition, German law covers payments made to a third party.

### **Penalties**

As noted, Germany implemented the Convention by adding bribery of foreign officials to its existing domestic bribery statutes. The penalties, therefore, are the same.

Under Sections 334 and 335, bribery of a public official is punishable under a three-tier system: “less severe offenses” earn a prison term of up to two years, or a fine; “general” offenses earn a prison term of three months to five years; “particularly severe cases” earn a prison term of one to ten years.

There is no statutory definition of “less severe offenses”; a “particularly severe case” is one which “concerns an advantage of large proportions,” where the perpetrator “continuously accepts advantages which he requested in return for the future performance of a public service,” and where the perpetrator “conducts the activity as a business or as a member of a gang, which he joined in order to continuously commit such acts.”

As noted, corporations are not subject to criminal liability. However, they may be prosecuted administratively and subjected to fines under the Administrative Offenses Act. The statutory fines on corporations are up to DM 1 million (approximately \$531,300) for intentional acts by a leading person and up to DM 500,000 (approximately \$265,600) for negligent acts. *See* Administrative Offenses Act, § 30. However, it is our understanding that corporations can be subject to fines up to the amount of the commercial advantage. *See* Administrative Offenses Act, § 17(4). We have not yet received any information on how often this provision has been invoked against German corporations.

It is our understanding that both the bribe and the proceeds of bribery are forfeitable under Criminal Code, Section 73. However, in the case of corpora-

tions, a corporation cannot both be fined and subjected to an order of forfeiture.

### **Books and Records Provisions**

We understand that Germany's laws prohibit the establishment of off-the-books accounts, and the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents to justify book entries. These prohibitions are in the form of principles to which a corporation must adhere to meet the legal requirement that it conform with legal norms.

### **Money Laundering**

Bribery is a predicate offense for Germany's money laundering provision. *See* Criminal Code § 261. As with domestic bribery, however, bribery committed within German territory is always a predicate offense, whereas bribery committed abroad is only a predicate offense if it is also punishable at the place of the offense.

### **Extradition/Mutual Legal Assistance**

Pursuant to bilateral agreements and various European conventions, Germany will render mutual legal assistance in investigations of foreign bribery. Germany also has a law permitting non-treaty based mutual legal assistance.

Pursuant to the Convention, bribery of a foreign public official is an extraditable offense. The United States has an extradition treaty in force with Germany. However, the German Basic Law prohibits the extradition of its nationals.

### **Complicity, Attempt, Conspiracy**

Attempt and complicity are both covered by German law. *See* Criminal Code §§ 25(2), 26, 27, and 334 and ACIB § 1(2).

## **Greece**

Greece signed the Convention on December 17, 1997, and ratified it on November 5, 1998. It deposited its instrument of ratification with the OECD on February 5, 1999. Greece's implementing legislation was adopted on November 5, 1998, and became effective on December 1, 1998.

Sources for this analysis include an unofficial translation of Greek Law 2656/1998 implementing

the Convention, as well as other information obtained by the U.S. embassy in Athens.

Under Article 28 of the Greek Constitution, generally approved rules of international law and international conventions that have been ratified under Greek law form an integral part of domestic Greek law and supersede any existing conflicting law, to the extent that they do not conflict with the Constitution. Accordingly, the Convention became an integral part of Greek law when Greece enacted Law 2656/1998 ratifying the Convention and including specific provisions to criminalize bribery of foreign public officials.

### **Basic Statement of the Offense**

The basic statement of the offense is set forth in Article 2(1) of the Law 2656/1998:

1. Any person who, in the conduct of international business and in order to obtain or retain business or other improper advantage, promises or gives, whether directly or through intermediaries, any undue gift or other advantage, to a foreign public official, for that official act or refrain from acting in relation to the performance of official duties, is punished with imprisonment of at least one year.

### **Jurisdictional Principles**

Although the statute itself does not contain any information about jurisdictional principles, Greek law provides for both territorial as well as nationality jurisdiction. Article 5 of the Greek Penal Code provides that Greece follows the principle of territoriality: Greek criminal laws apply to all acts committed in Greek territory, either by Greeks or other nationals. Article 16 generally defines the place where acts are committed as the place where the act or omission was carried out in whole or in part. It is our understanding that if only part of the act in furtherance of the bribery took place in Greece, the crime would still fall within Greek jurisdiction. Article 6 of the Penal Code provides that Greek criminal laws apply to criminal acts committed abroad by a Greek national if the act is punishable under the laws of the country in which it occurs.

### **Coverage of Payor/Offendor**

Article 2 covers bribery by "any person," but does not describe what persons or entities are covered by this term. It is our understanding that "any person" means any individual.

Under Article 71 of the Greek Civil Code, legal entities are generally responsible for the acts or omissions of their representatives, meaning those in management positions, in carrying out the legal entities' functions. Greek law does not provide for criminal responsibility for legal entities. Therefore, corporations are subject only to administrative penalties (see below). It is unclear to what extent a corporation could be held responsible for bribes involving lower-level employees. It appears that under Criminal Code Article 922, the company may also be held responsible in some circumstances for acts and omissions of its employees and auxiliary personnel whose positions have been prescribed by the company's bylaws and when acting in the scope of their positions.

### **Coverage of Payee/Offeree**

The statute itself does not define "foreign public official." However, it is our understanding that the statute incorporates the definitions found in the Convention and Official Commentaries, and specifically that Convention Article 4(a) containing the definition of "foreign public official" and Commentary footnotes 14-18 apply. It is our understanding that the definition of a foreign public official will be interpreted in light of the definitions of domestic public officials under the Greek Penal Code, Articles 13 and 263(a), which is even broader than the Convention definition.

### **Penalties**

Although Law 2656 states (in our English translation) that any person who bribes a foreign public official "is punished with imprisonment of at least one year," the penalty could be from one to five years imprisonment, in conformity with the penalties prescribed for bribery of domestic officials under Greek Civil Code Articles 235 and 236. There do not appear to be any fines for individuals for the bribery of domestic or foreign public officials, although this is unconfirmed.

As stated above, the Greek judicial system does not recognize criminal responsibility for legal entities. Article 5 provides three kinds of administrative penalties for a company whose managerial employees violate the law: fines of up to three times the value of any benefit that it has received; temporary or permanent prohibition from doing business; or provisional or permanent exclusion from state grants or incentives. Article 2(2) provides for the confiscation of the bribe or the value of the bribe. Article 76 of the Greek Code of Criminal Procedure provides for con-

fiscation of the proceeds of a crime. Also, if an act violates the anticorruption laws as well as Article 2(1) of Law 2331/1995 concerning money laundering then paragraphs 6 to 10 of that article on the confiscation of goods will also apply. Goods may also be seized during the criminal investigation/inquiry under the Code of Criminal Procedure Articles 258, 259, 260, 261, 266, 288, and 495.

Under Articles 111, paragraphs 3 and 112 of the Penal Code, the statute of limitations in general for acts of bribery, as for all crimes, is five years after the commission of the act.

### **Books and Records Provisions**

Books and records are covered by Greece's Accounting Code. Violations of the code are punished under Law 2523/1997, which provides for both criminal and civil sanctions. If the violations in question are committed in furtherance of a bribe to a foreign public official, Article 3 of Law 2656/1998 also applies. Article 3 specifically prohibits off-the-books business accounts, false bookkeeping entries, or false documents and provides for a three-year prison term for such offenses, unless a longer term would apply pursuant to another provision of Greek law. Article 4 of Law 2656/1998 gives the authority to investigate violations of Article 3 to the Greek Financial and Economic Crimes Office.

### **Money Laundering**

Bribery of foreign public officials is a predicate offense for the application of the Greek money laundering law 2331/1995, as is the case with domestic bribery, without regard to where the bribe occurred.

### **Extradition/Mutual Legal Assistance**

Greece has an extradition treaty with the United States that has been in effect since 1932. The treaty includes bribery as an extraditable offense. Generally, under Article 437 of the Code of Criminal Procedure, extradition is permitted if the maximum prison sentence for the act upon which the extradition request is based exceeds two years under both Greek law and the law of the country requesting extradition. Bribery of foreign public officials is an extraditable offense because, as noted above, the maximum prison sentence is five years. The Convention will serve as the legal basis for extradition for the offense of bribery of foreign public officials. Under Article 428 of the Code of Criminal Procedure, Greece cannot extradite its own citizens.

The Greek government will offer mutual legal assistance in accordance with the European Convention on Mutual Legal Assistance concerning criminal acts, and in accordance with its bilateral mutual assistance treaties. Article 7 of Law 2656/1998 gives the authority for purposes of Convention Article 4 on jurisdiction to the Greek Ministry of Justice.

### **Complicity, Attempt, Conspiracy**

It is our understanding that the Greek Penal Code Articles 45-49 on complicity and aiding and abetting apply to bribery of foreign public officials.

## **Hungary**

Hungary signed the OECD Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on December 4, 1998. Hungary's implementing legislation entered into force on March 1, 1999.

Our primary source for this analysis is the implementing legislation contained in Title VIII of the Hungarian Criminal Code (Crimes Against the Purity of International Public Life), dated December 22, 1998.

### **Basic Statement of the Offense**

The basic prohibition for bribery of public officials is Section 258/B of the Hungarian Criminal Code (HCC):

- (1) The person who gives or promises a favor to a foreign official person or with regard to him to another person, which may influence the functioning of the official person to the detriment of the public interest commits a misdemeanor and shall be punishable with imprisonment of up to two years.
- (2) The briber shall be punishable for a felony with imprisonment of up to three years, if he gives or promises the favor so that the foreign official person violate his official duty, exceed his competence, or otherwise abuse his official position.
- (3) The perpetrator of the crime defined in subsection (1) shall not be punishable, if he gave or promised the favor upon the initiative of the official person because he could fear unlawful disadvantage in case of his reluctance.

### **Jurisdictional Principles**

Hungary applies the principles of territoriality and nationality jurisdiction. *See* HCC § 3. In addition, our

translation of Hungary's law states that Hungary will apply its law to non-Hungarian citizens abroad, if the acts are violative of Hungarian law and the law of the place of perpetration. *See* HCC § 4.

### **Coverage of Payor/Offeror**

The Hungarian statute applies to "person[s]." Hungarian law does not provide for criminal responsibility of corporations. We are not aware of any administrative or civil sanctions that may be imposed on legal persons for bribery.

### **Coverage of Payee/Offeree**

A foreign official person is defined in the statute to include the following (*see* HCC § 258/F(1):

- A person holding a legislative, administrative or judicial office in a foreign state.
- A person at an organ or body entrusted with public power, public administration duties, who fulfills tasks of public power, or state administration.
- A person serving at an international organization which is constituted by international treaty, whose activity forms part of the proper functioning of the organ.
- A person elected to the assembly or other elected body of an international organization that is constituted by international treaty.
- A member of an international court which has jurisdiction over the Republic of Hungary, a person serving the international court, whose activity forms part of the proper functioning of the court.

### **Penalties**

The penalties for bribery of a foreign public official are up to two years for purchasing influence and up to three years where the bribe was intended to induce the official to violate his official duty, exceed his competence, or otherwise abuse his official position. These penalties are identical to those for domestic bribery. Compare HCC §§253, 258/B. In addition, Hungary authorizes the confiscation of property "which was obtained by the perpetrator during or in connection with the commission of the crime." HCC § 62, 63. In addition, the law provides for the confiscation of instrumentalities of crime. *See* HCC §§ 77, 77/A.

Although Hungary does not provide for criminal responsibility of a corporation it does provide that an officer of a business association may be barred from

being an “executive officer of a business association until ... relieved of the detrimental legal consequences related to his criminal record.” Act CXLIV of 1997 on Business Associations, § 23. In addition, such a person may be barred from being an executive officer in a particular profession for up to three years. *See id.*

### **Books and Records Provisions**

Act XVIII of 1991 on Accounting defines the reporting and bookkeeping obligation of economic organizations. In addition, tax provisions include detailed regulations concerning the verification, accounting, and registration of incomes and costs arising in connection with the activity of the enterprise.

### **Money Laundering**

Foreign and domestic bribery are predicate offenses for Hungary’s money laundering offense. *See* HCC § 303.

### **Extradition/Mutual Legal Assistance**

Hungary will extradite non-nationals provided there is dual criminality. *See* HCC § 11. Hungary will extradite Hungarian nationals only if the person holds dual nationality and is a resident of a foreign state. *See* HCC § 13.

Hungary has both an extradition treaty and a mutual legal assistance treaty with the United States, both of which entered into force in 1997.

Hungary will provide mutual legal assistance provided that doing so will not “prejudice the sovereignty, security, or public order of the Republic of Hungary” (Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters, § 2).

### **Complicity, Attempt, Conspiracy**

Hungarian law covers attempt and abetting. *See* HCC §§ 16-21.

## **Iceland**

Iceland has implemented the Convention by enacting Act No. 147/1998, amending its General Penal Code, and Act No. 144/1998, on the Criminal Liability of Persons on Account of Bribery of Public Officials. Both laws were passed on December 22, 1998, and went into effect on December 30, 1998. Act No. 147/1998 amended section 109 of the General Penal Code to fully equate bribery of a foreign official or an official of a public international organization with bribery of a domestic public official.

### **Basic Statement of the Offense**

Section 109 of the General Penal Code provides:

(1) Whoever gives, promises or offers a public official a gift or other advantage in order to induce him to take an action or to refrain from an action related to his official duty, shall be imprisoned for up to three years, or, in case of mitigating circumstances, fined.

(2) The same penalty shall be ordered if such a measure is resorted to with respect to a foreign public official or an official of a public international organization in order to obtain or retain business or other improper advantage in the conduct of international business.

Section 18 of the General Penal Code requires intent for all criminal actions; therefore bribery of a foreign public official must be intentionally committed.

### **Jurisdictional Principles**

Iceland’s law provides for both territorial and nationality jurisdiction. Chapter 2 of the General Penal Code allows for prosecution of any offense committed, in part or in whole, in Iceland. The General Penal Code requires only that a significant number of the elements be traced to Iceland. Under Section 7 of the General Penal Code, an offense is deemed to have been committed where its consequences are actual or deliberate.

Section 5 of the General Penal Code allows Iceland to prosecute its nationals for crimes committed abroad if the acts were also punishable under the law of the nation where committed. However, under Section 8 of the General Penal Code, the penalties for such offenses are limited to those of the country where the crime is committed.

### **Coverage of Payor/Offerrer**

Iceland’s General Penal Code applies to whoever offers or pays a bribe, without reference to nationality. Legal entities are also covered under Act No. 144/1998 on the Criminal Liability of Legal Persons on Account of Bribery of Public officials.

### **Coverage of Payee/Offeree**

“Foreign public official” is not specifically defined in the General Penal Code. However, the explanatory notes to the act amending Section 109 of the General Penal Code expressly state that the term “foreign public official” is meant to have as broad a scope as in the Convention. Furthermore, the explanatory notes state that the law will be interpreted in conformity with the Convention.

## **Penalties**

Under Section 109 of the Iceland General Penal Code, the maximum prison sentence for bribery of a domestic or foreign public official is three years. Fines may be assessed in certain circumstances.

Act No. 144/1998, on Criminal Responsibility of Legal Persons on Account of Bribery of Public Officials, provides that a legal person may be fined if its employees have committed acts of bribery of domestic or foreign public officials. Icelandic law provides for criminal responsibility of legal persons. Legal persons are subject to fines, but the statute gives no indication of the amount of the fines.

The Code of Criminal Procedure allows for the seizure of “objects” if obtained by criminal means under Section 78. “Objects” include documents, money, and proceeds.

## **Books and Records Provisions**

Section 1 of the Business Records Act requires all businesses, regardless of form, to maintain clear records. Section 6 of the Business Records Act requires businesses to maintain records in such a manner as to make all transactions traceable. Section 36 of the Business Records Act makes violating any part of the act a criminal offense. Violators may be fined and, in serious cases, be imprisoned for a period not to exceed six years.

## **Money Laundering**

Bribery of a foreign public official or a domestic official is a predicate offense for the application of Iceland’s money laundering law found in Section 264 of the General Penal Code. Where the bribe occurred is not a relevant consideration.

## **Extradition/Mutual Legal Assistance**

Act 13/1984 on Extradition of Criminal Offenders and other Assistance in Criminal Matters (Extradition Act) allows the extradition of any suspect so long as the alleged act is punishable under Icelandic law for at least one year in prison. However, the extradition of nationals of Iceland is forbidden under Section 2 of the Extradition Act.

The Extradition Act also governs mutual legal assistance. Under the Extradition Act, Iceland will render legal assistance regardless of the applicable penalty. The Code of Criminal Procedure sets forth the procedures for rendering legal assistance to foreign states.

## **Complicity, Attempt, Conspiracy**

Section 20 of the General Penal Code provides that any attempt to commit a crime is punishable. Under Section 22 of the General Penal Code all accomplices to an offense under the General Penal Code are criminally liable. Furthermore, Section 70 of the General Penal Code provides that when two people commit a crime, both may be prosecuted for the commission of the crime. In addition, under Section 70, acting together to commit a crime is regarded as an aggravating factor.

## **Japan**

Japan signed the Convention on December 17, 1997, and submitted its instrument of ratification with the OECD on October 13, 1998. On April 10, 1998, the government of Japan formally submitted the Convention and its implementing legislation to the National Diet. The National Diet approved the Convention on May 22, 1998. The implementing legislation was adopted September 18, 1998. The implementing legislation provides that it shall enter into force as of the date on which the OECD Convention enters into force for Japan. That date was February 15, 1999.

Japan’s legislation to implement the Convention is found in amendments to the Unfair Competition Prevention Law (Law No. 47 of May 19, 1993) (UCPL), rather than the Penal Code, where domestic bribery laws are found. The penalties are criminal, however. Provisions of the Penal Code apply generally to all crimes unless specified otherwise.

Sources for this analysis include an official English translation, prepared by the government of Japan, of the Unfair Competition Prevention Law, as amended; information obtained from the government of Japan through diplomatic exchanges; and unofficial translations of various provisions of the Japanese Penal Code and other provisions of Japanese law.

There are concerns as to whether maximum fines for natural and legal persons are “effective, proportionate, and dissuasive,” as Article 3(1) of the Convention requires. There is also a concern that Japan will not subject the proceeds of bribery to confiscation, nor will it impose monetary sanctions of comparable effect (other than the criminal fines that otherwise apply to bribery) in lieu of such confiscation, as required under Convention Article 3(3).

## **Basic Statement of the Offense**

Article 10 bis (1) of the Unfair Competition Prevention Law prohibits any person, for the purpose of

obtaining an improper business advantage, from offering or promising any undue pecuniary or other advantage to a foreign public official in order that such official act or refrain from acting in relation to the performance of his official duties, or in order to induce such official to use his position to make another official act or refrain from acting in relation to the performance of his official duties.

Article 10 bis (1) does not include the element of intent. We understand that intent is generally an element in all criminal offenses pursuant to Article 38 of the Penal Code. Also, Article 10 bis (1) does not address bribes offered, promised, or given through intermediaries, nor bribes paid, on behalf of a public official, to a third party.

### **Jurisdictional Principles**

Article 10 bis of the UCPL does not address basic jurisdictional principles. Article 8 of the Penal Code states that its provisions apply to crimes defined under other Japanese laws unless such laws specifically provide otherwise. The UCPL contains no such provision and therefore is governed by the Penal Code. Article 1 of the Penal Code sets forth the principle of territoriality; We understand that in order to establish jurisdiction, at least one element of the offense must be committed in Japan. Under Article 3 of the Penal Code, nationality jurisdiction is applied only for specified crimes; bribery is not one of them.

The statute of limitations for active bribery of foreign public officials, like bribery of domestic officials, is three years. Article 250 of the Code of Criminal Procedure prescribes a three-year statute of limitations for offenses with a potential sentence of less than five years. Article 255 bis (1) of the Code of Criminal Procedure provides that the statute of limitations does not run during the period in which the offender is outside Japan.

### **Coverage of Payor/Offeror**

Article 10 bis (1) prohibits conduct by any person, without reference to nationality.

### **Coverage of Payee/Offeree**

In Article 10 bis (2), “foreign public official” is defined to include

- Persons engaged in public service for a national or local government in a foreign country.
- Persons engaged in service for an entity constituted under foreign special laws to carry out specific tasks in the public interest.

- Persons engaged in business operations (1) in which more than half of the stock or capital is held directly by a foreign government; (2) in which the majority of the executives are appointed by a foreign government; or (3) that have been granted special privileges by a foreign government.

- Persons engaged in public service for an international organization.

- Persons exercising a public function that falls under the competence of and is delegated by a foreign government or international organization.

Under Articles 197 and 198 of the Penal Code, laws against active and passive domestic bribery apply in cases in which a person is bribed in anticipation of becoming a public official, if that person actually becomes a public official. It is not clear whether this applies equally to bribery of a foreign public official.

### **Penalties**

Under Article 14 of the Unfair Competition Prevention Law, as amended, legal persons can be held criminally liable. Article 14 further provides that the maximum fine for legal persons is 300 million yen (approximately \$2.5 million). There is no comparable penalty for domestic bribery because the Penal Code which covers domestic bribery does not provide for criminal liability of legal persons.

Under Article 13, the penalties for natural persons are imprisonment for up to three years or a maximum fine of only 3 million yen (approximately \$25,000). The corresponding penalties for domestic bribery are imprisonment for up to three years or a maximum fine of 2.5 million yen (approximately \$21,000) (Penal Code Article 198). It appears that a fine or imprisonment can be applied in the alternative, but not together.

Article 19 of the Penal Code provides for confiscation of the bribe or its monetary equivalent. It appears that Japan does not intend to subject the proceeds of bribery to confiscation (although Article 19 appears to provide for this), or to apply monetary sanctions of comparable effect.

Japanese law apparently does not provide for other civil or administrative sanctions for bribery such as debarment from government procurement or ineligibility for government assistance.

### **Books and Records Provisions**

The implementing legislation does not include provisions on books and records. However, other provi-



sions of Japanese law apply. Companies and partnerships are generally subject to the Japanese Commercial Code. Under Article 498 of the Commercial Code, persons who falsify records are subject to fines. Companies that issue securities listed on a stock exchange are covered by the Securities and Exchange Law (SEL). Article 193 of the SEL provides that balance sheets, profits and loss statements, and other documents relating to financial accounting are to be prepared in accordance with the requirements prescribed by the Ministry of Finance. Those requirements are set forth in the Ordinance of the Ministry of Finance concerning Financial Statements. Under Article 193-2 of the SEL, documents relating to financial accounting must be audited and certified by an independent auditor. Under Article 30 of the Certified Public Accountants Law, accountants who falsely certify the correctness of financial documents are subject to administrative sanctions. Article 197 of the SEL provides for criminal penalties for persons who submit false registration statements. Such persons may also, under Article 18 of the SEL, be held civilly liable to injured investors.

### **Money Laundering**

Bribery, domestic or foreign, is currently not a predicate offense under Japan's money laundering laws. A proposed anti-organized crime law would appear to make acceptance of bribes by foreign public officials (passive bribery) a predicate offense.

### **Extradition/Mutual Legal Assistance**

The implementing legislation does not include provisions on extradition or mutual legal assistance. Under the U.S.-Japan extradition treaty, bribery is an extraditable offense so long as it is punishable in both countries by imprisonment for a period of more than one year. The United States and Japan do not have a bilateral mutual legal assistance treaty. We understand that legal assistance may be provided to foreign countries under the Law for International Assistance in Investigation and the Law for Judicial Assistance to Foreign Courts.

### **Complicity, Attempt, Conspiracy**

Japan's Penal Code covers instigation of (Article 61) and aiding and abetting (Article 62) criminal acts. Under Japanese law, attempt does not apply to the bribery of domestic officials. Accordingly, the implementing legislation does not criminalize attempt with respect to bribery of foreign public officials.

## **Korea**

Korea signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on December 4, 1998. The implementing legislation entered into force on February 15, 1999. Sources for this analysis include an unofficial translation of the Foreign Bribery Prevention Act in International Business Transactions of 1998 (FBPA) and diplomatic reporting from the U.S. embassy in Seoul.

### **Basic Statement of the Offense**

Article 1 sets forth the purpose of the FBPA, which is to contribute to the establishment of sound practice in international business transactions by criminalizing bribery of foreign public officials and providing the details necessary for implementing the OECD Convention.

The basic statement of the offense of bribery is contained in the FBPA's penalty provisions for natural (Article 3) and legal (Article 4) persons. Article 3, entitled "Criminal Responsibility of Bribery," provides that

Any person, promising, giving or offering [a] bribe to a foreign public official in relation to his/her official business in order to obtain [an] improper advantage in the conduct of international business transactions, shall be subject to [penalties].

We understand that under Korean law generally a bribe is "any undue advantage in relation to a public official's duty or business."

Article 4 covers such bribes on behalf of a legal person by a "representative, agent, employee or other individual working for [a] legal person in relation to its business."

There are two exceptions to the basic statement of the offense. Article 3(2) provides an exception for (1) bribes where they are "permitted or required by the law" in the country of the foreign public official and (2) facilitating payments.

### **Jurisdictional Principles**

Article 2 of the Korean Criminal Code provides for territoriality jurisdiction. Jurisdiction will be established over any offense which has been committed in the territory of the Republic of Korea.

Article 3 of the Korean Criminal Code allows Korea to prosecute its nationals for offenses committed abroad (nationality jurisdiction). Article 6 of the Korean Criminal Code provides Korean jurisdiction over any offenses in which the Republic of Korea or a Korean national is a victim.

### **Coverage of Payor/Offeror**

Article 3 covers bribes made by “any person,” without reference to nationality.

Article 4 of the FBPA provides that a legal entity may be fined up to one billion won (approximately \$840,000) when a representative, agent, or other employee of the legal entity, in the ordinary conduct of the business of the legal entity, commits the offense of bribery of a foreign public official. If the profit from the transaction exceeds 500 million won (approximately \$420,000), the fine may be up to twice the profit. The fine is in addition to penalties that may be imposed on the representative, agent, or employee. Fines will not be imposed if there have been significant supervisory efforts to prevent the violation.

### **Coverage of Payee/Offeree**

“Foreign public officials” are defined in Article 2 of the FBPA. Article 2 covers officials, whether appointed or elected, in all branches of government, at either the national or local level. The FBPA covers all foreign public officials who perform public functions, such as “business, in the public interest, delegated by the foreign government,” officials of public international organizations, and persons working for companies “over which a foreign government holds over 50 percent of its subscribed capital” or over which the government exercises “substantial control.” Article 2(2)(c) of the FBPA provides an exception for employees of businesses that operate on a “competitive basis equivalent to entities of [an] ordinary private economy [sic]” and that do not receive “preferential subsidies or other privileges.”

### **Penalties**

For individuals, Article 3(1) of the FBPA provides for a maximum prison sentence of five years or a fine of up to 20 million won (approximately \$16,800), or twice the profit realized as a result of the bribe. Article 3(3) provides that where imprisonment is imposed, “the prescribed amount of fine shall be concurrently imposed.” The stated intent of Article 3(3) of the FBPA is to effectively deprive the offeror/payor of the profits obtained from the bribery. Under Article 132 of the Korean Criminal Code, the criminal penalty for bribery of domestic public officials is imprisonment for a maximum of five years and a maximum fine of 20 million won (approximately \$16,800.)

In addition to the fines imposed on representatives, agents, employees, or other individuals work-

ing for legal persons under Article 3, the entity itself may be fined under Article 4. Article 4 of the FBPA provides for a maximum fine of the greater of one billion won (approximately \$840,300) or twice the profits realized as a result of the bribe. As mentioned above, the same provision provides an exception from the sanctions for corporate liability where there has been “due attention” or “proper supervision” to prevent an offense under the FBPA.

Article 5 of the FBPA provides for confiscation of bribes in the possession of the briber or another person who has knowledge of the offense after it has been committed. However, the bribe proceeds are not subject to confiscation. Instead, the FBPA in Articles 3 and 4 provides for a fine up to twice the profits obtained through bribery of a foreign public official (see above).

Under Article 249 of the Criminal Procedures Act, the statute of limitations for the bribery of foreign public officials under the act is five years. Article 253 of the Criminal Procedures Act provides that when a prosecution is initiated against one of the offender’s accomplices, or the offender remains overseas to circumvent punishment, the statute of limitations is suspended.

### **Books and Records Provisions**

It is our understanding that under Korean law, firms must prepare financial statements in accordance with Korean accounting standards, which prohibit off-the-books transactions and accounts. The accounting standards require all financial transactions to be recorded on the basis of objective documents and evidence.

We understand in addition that Korea’s External Audit Law obligates auditors to report fraud on the part of managers to shareholders and a statutory auditor. Korea’s regulatory authorities can bring administrative measures against firms and auditors for material omissions, falsifications, and fraud. Firms and auditors may, in some circumstances, be subject to criminal sanctions.

### **Money Laundering**

Convention Article 7 requires that each Party that has made bribery of domestic public official a predicate offense for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official. Currently, bribery of neither domestic nor foreign officials is a predicate offense for the application of Korean money laundering legislation.

## **Extradition/Mutual Legal Assistance**

It is our understanding that Korea's Extradition Act provides for granting extradition requests on a reciprocal basis even in the absence of a treaty, but reserves discretionary authority to the government to deny extradition. Finally, we understand that dual criminality is a mandatory condition for extradition under the Korean Extradition Act, but that Korea may deem the requirement of dual criminality fulfilled if the offense falls within the scope of Article 1 of the Convention.

## **Complicity, Attempt, Conspiracy**

Complicity is covered under the Korean Criminal Code, which categorizes the offense as coauthoring, abetting and aiding. Article 30 of the Korean Criminal Code provides that when two or more persons jointly commit an offense, each person shall be punished as an author. Article 31(1) of the Korean Criminal Code provides that any person who abets another person in committing an offense shall be subject to the same criminal liability as that of the actual offender. Article 32 of the Korean Criminal Code provides that any person who aids another person's commission of an offense shall be punished by a penalty, which shall be less than that of the author.

## **Norway**

Norway signed the Convention on December 17, 1997, and submitted its instrument of ratification with the OECD on December 18, 1998. The amendments to the Penal Code were passed on October 27, 1998, and entered into force on January 1, 1999.

Norway has implemented the Convention by amending Section 128 of the Norwegian Penal Code to extend existing provisions of law regarding the bribery of domestic public officials to cover the bribery of foreign public officials and officials of public international organizations.

Sources for this analysis include the Norwegian Penal Code, the Extradition Act and information provided by our embassy in Oslo.

There are concerns that under Norwegian law, the maximum penalty for bribery of a foreign public official is imprisonment for only up to one year, and that the relevant statute of limitations is only two years.

## **Basic Statement of the Offense**

Section 128 prohibits any person from using threats or the granting or promising of a favor to induce a public official illegally to perform or omit to

perform an official act. Pursuant to the recent amendment, the term "public official" includes foreign public officials and officials of public international organizations.

Section 128 does not refer to intent. However, section 40 of the Penal Code states that the provisions of the Penal Code apply only if a person acts intentionally. Section 128 also does not mention bribes paid through intermediaries, nor does it expressly cover payments that are made to third parties for the benefit of a public official. Under Section 128, the bribe must be intended to induce a public official "illegally to perform or omit to perform an official act."

## **Jurisdictional Principles**

We understand that Norway exercises territorial jurisdiction over acts of bribery of foreign officials by any person so long as any part of the crime is committed in Norway. In addition to territorial jurisdiction, under section 12(3)(a) of the Penal Code, Norway applies nationality jurisdiction over crimes, including acts of bribery of foreign public officials, committed abroad by Norwegian nationals or persons domiciled in Norway.

Under Section 67 of the Penal Code, the statute of limitations for bribery of foreign officials is only two years. This is linked to the length of the maximum penalty. If Norway increases the maximum term of imprisonment then the statute of limitations will automatically increase.

## **Coverage of Payor/Offeror**

Section 128 specifically covers acts by "any person."

## **Coverage of Payee/Offeree**

Although Norway's law apparently does not define foreign public official, we understand that Norway will interpret "foreign public official" in accordance with the requirements of the Convention.

## **Penalties**

Under Section 128, the penalty for natural persons (for bribery of domestic or foreign officials) is a fine or imprisonment for a term not exceeding one year. It is unclear whether penalties could be applied in the alternative or cumulatively. There is no stated limit on the amount of fines.

Under Section 48(a) of the Penal Code, enterprises may be held criminally liable when a penal provision is contravened by a person acting on behalf of the

enterprise. (“Enterprise” is defined as a company, society or other association, one-person enterprise, foundation, estate or public activity.)

There is no stated limit to such fines; Section 48(b) lists factors that are to be considered in determining the size of a fine. Under Section 48(a), an enterprise may also “be deprived of the right to carry on business or may be prohibited from carrying it on [sic] in certain forms.”

Confiscation of both the bribe itself and the proceeds of bribery is authorized under Section 34-37(d) of the Penal Code.

Norway apparently does not currently have civil or administrative sanctions that could be applied in cases of bribery of foreign officials.

### **Books and Records Provisions**

Section 2.1 of the Norwegian Accounting Act requires that records be kept of all information that is “of importance for the size and composition of property, debts, income and expenditure.” Section 8.5 provides that violations of the Accounting Act are punishable by fines or imprisonment.

Under Section 5.1 of the Auditing Act, auditors are required to ensure that accounts are correct, that the company manages its capital in a prudent fashion, and that there are satisfactory internal controls. Pursuant to Section 9.3, violators of the Auditing Act are subject to fines or imprisonment.

### **Money Laundering**

Section 317 of the Penal Code makes it a crime to receive or obtain the proceeds of any criminal act under Norwegian law, as well as to aid and abet the securing of such proceeds for another person. As a result, bribery of domestic or foreign officials is a predicate offense for the purpose of application of money laundering legislation.

Violations of Section 317 are punishable by fines or imprisonment for a term not exceeding three years. For “aggravated offenses”, the penalty is imprisonment for a term not to exceed six years.

### **Extradition/Mutual Legal Assistance**

Under the extradition treaty between the United States and Norway, bribery is an extraditable offense so long as it is punishable in both states by a penalty of deprivation of liberty for a period of more than one year. This dual criminality requirement is also found in Section 3.1 of the Extradition Act. As previously noted, currently Section 128 of the Penal Code

provides that imprisonment shall not exceed one year. However, Section 3.2 of the Extradition Act provides that the “King-in-Council” may enter into extradition agreements covering criminal acts with penalties under Norwegian law of one year’s imprisonment or less. Section 2 of the Extradition Act prohibits the extradition of Norwegian nationals.

The United States and Norway do not have a mutual legal assistance treaty. It is our understanding, however, that using the Convention as a legal basis, Norway will provide assistance to other parties.

### **Complicity, Attempt, Conspiracy**

Section 128 of the Penal Code expressly applies to those who are accessories to acts of bribery. It is not clear to what extent participation as an “accessory” would cover incitement, aiding and abetting, or authorization of acts of bribery. Apparently, the Penal Code contains no specific provisions on conspiracy.

## **United Kingdom**

The United Kingdom signed the Convention on December 17, 1997; it was approved by Parliament on November 25, 1998. The U.K. deposited its instrument of ratification with the OECD on December 14, 1998.

The following review is based on the texts of relevant U.K. laws, information from our embassy in London, and a March 1998 Report of the U.K. Law Commission that considered how the U.K. would meet the requirements of the Convention.

Under U.K. law, bribery of public officials is primarily covered under three statutes: the Public Bodies Corrupt Practices Act 1889 (“the 1889 Act”), the Prevention of Corruption Act 1906, and the Prevention of Corruption Act 1916, referred to collectively as the Prevention of Corruption Acts. These statutes do not specifically address the bribery of foreign public officials. The U.K. has stated, however, that these statutes address the offenses covered in the Convention and that it is in compliance with the OECD Convention under the 1906 act. Generally, the 1906 act criminalizes bribes corruptly offered or given by any person to an agent to induce him or her to act or not to act in relation to his or her principal’s affairs or business.

### **Basic Statement of the Offense**

Section 1(1) of the 1906 act states that

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or for-

bearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business ... he shall be guilty of a misdemeanor.

The 1906 act applies to all "agents," whether in the public or private sector, who act corruptly in relation to his or her "principal's" affairs or business. An "agent" is anyone who is employed by or acting for another, or any person serving under the Crown or under any corporation or any public body.

### **Jurisdictional Principles**

With very few exceptions, the U.K. exercises only territoriality jurisdiction. It is our understanding that if any part of the offense, either the offer or acceptance or agreement to accept, takes place within the territory of the U.K. jurisdiction, it can be prosecuted in the U.K. The Criminal Justice Act of 1998 on Terrorism and Conspiracy provides that any conspiracy in the U.K. to commit crimes abroad is a criminal offense, and our embassy reports that the antiterrorism legislation would apply to a conspiracy in the U.K. to bribe a foreign public official.

### **Coverage of Payor/Offeror**

The Prevention of Corruption Acts concern bribery by "any person" without distinction as to nationality. The 1906 act, which covers bribes by "any person," does not define "person."

The U.K. legal system provides criminal liability for corporations. Companies can be held criminally responsible, and fined, for the acts of those who control the company, including representatives of the company.

### **Coverage of Payee/Offeree**

It is our understanding that under the U.K.'s anti-corruption laws, an official is identified based upon his or her position as an officer, member or servant of a "public body."

The 1906 act uses agency law to forbid bribes that would encourage an agent in the private sector to contravene the principal/agent relationship (subsequently amended in the 1916 act to apply equally to agents in the public sector).

### **Penalties**

The penalty for corruption in a magistrate's court is a maximum of six months imprisonment

and/or a fine of £5,000 (approximately \$8,000). For convictions in crown courts, the penalty is a maximum of seven years imprisonment and/or an unlimited fine. There are no express provisions on corporate criminal liability, but we understand that companies can be fined for breaches of the criminal law. Persons found guilty of bribery, may, at the discretion of the court, be ordered to pay the amount or value of any gift, loan, fee, or reward received by him or her.

There is no statute of limitations under U.K. laws for prosecution of bribery cases.

### **Books and Records Provisions**

The Companies Act of 1985, Sections 221, 222, and 722 prohibit generally the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents. These provisions govern private and public limited companies, companies limited by guarantee, and unlimited companies.

### **Money Laundering**

It is our understanding that since offering and accepting bribes are indictable offenses, they automatically fall within the purview of U.K. money-laundering legislation, both as to the bribe and the bribe proceeds.

### **Extradition/Mutual Legal Assistance**

The U.K. has extradition agreements with all of the OECD member countries except Japan and Korea. In the absence of an extradition agreement, the U.K. considers extradition requests on an ad hoc basis. If, under the law of the country requesting extradition, the offense is punishable with a prison term of twelve months or more, extradition may be available. U.K. nationals may be extradited.

Under Part I of the Criminal Justice Act of 1990 (International Cooperation), the U.K. can provide mutual legal assistance to other countries without treaties or agreements. It is our understanding that the U.K. will provide assistance to foreign authorities to facilitate any criminal investigation or proceeding in the requesting country, and that there is no threshold penalty level for the provision of mutual legal assistance. We further understand that dual criminality is not required for mutual legal assistance other than in general cases of search and seizure.

**Complicity, Attempt, Conspiracy**

Complicity, aiding and abetting, incitement, and authorization are addressed in an 1861 act entitled “Aiders and Abettors,” which provides that

Whosoever shall aid, abet, counsel, or procure the commission of [any indictable offense], whether the same be [an offense] at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

Under U.K. law, conspiracy to commit a crime is also a crime, and subject to the same penalties as the primary offense.